Is Virginia the New California? Maybe…

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Over Easter weekend, in what can only be described as a deluge of activity, Virginia's Governor Ralph Northam signed a series of laws, each effective July 1, 2020. These include a fundamental rewrite of the Virginia Human Rights Act, a very broad whistleblower protection law, the creation of a private right of action for wage theft law that provides for treble damages, an employee misclassification law that presumes a worker is an employee, a law banning restrictive covenants for a broad swath of "low-wage" employees, a new minimum wage, and a law de-criminalizing marijuana possession for first offenses. Each of these laws impact Virginia employers who will no doubt still be reeling from the effects of the COVID-19 pandemic when they go into effect in July.

The Virginia Values Act

As widely noted, the Virginia Values Act (the "Values Act") expands the scope of the Virginia Human Rights Act explicitly to prohibit discrimination in employment and housing on the basis of sexual orientation and gender identity–protected characteristics not-yet-recognized under Title VII of the Civil Rights Act and the subject of cases now-pending before the U.S. Supreme Court.

However, the long-term significance of the Values Act for employers comes from its fundamental changes to the Human Rights Act's private rights of action and remedies available to employees who sue their employers (and purveyors of housing). Previously, § 2.2-3903 of the Human Rights Act contained only a limited private right of action for employment discrimination for: 1) unlawful discharge on the basis of race, color, religion, national origin, sex, pregnancy, or childbirth or related medical conditions, including lactation, by employers employing more than five but fewer than 15 persons; and 2) unlawful discharge on the basis of age by employers employing more than five but fewer than 20 persons.

Section 2.2-3903 also previously limited a prevailing employee's remedies to: 1) 12 months of backpay plus interest; and 2) attorneys' fees capped at 25% of the backpay award. In addition, § 2.2-3903 expressly precluded the award of any "other damages, compensatory or punitive, nor … reinstatement of the employee."

The Values Act repeals § 2.2-3903 *in its entirety*. This means the Human Rights Act's private right of action for aggrieved employees is essentially without limits. For example, where the private right of action was limited to cases of "unlawful discharge," the Values Act expands the right of action to include all forms of discrimination and retaliation, like federal law under Title VII.

Additionally, under the Values Act, in cases of allegedly unlawful discharge, employers with as few as five employees can be sued in Virginia state court for alleged violations. The Values Act also removes the Human Rights Act's 12-month backpay damages cap. Instead, it states that courts may award prevailing employees "compensatory and punitive damages" and uncapped "reasonable attorney fees and costs," among other non-monetary relief available to employees for the first time.

Given these expansions (including, for the moment, no stated statutes of limitation or timing for filing suit after a "Right to Sue" notice is issued), Virginia state courts are now–for the first time– an attractive and obvious place for employees to sue Virginia employers. This is especially true given the near impossibility of obtaining summary judgment in employment cases litigated in Virginia state courts. We expect plaintiffs' firms to entirely forego federal discrimination claims in favor of Human Rights Act claims so as to preclude removal of these cases to federal court.

Virginia's New Whistleblower Law

Signed the Day after the Values Act, HB798 (the "Whistleblower Law"), the first of its kind applying to private employers in Virginia, is akin to a handful of generalized state whistleblower laws. The Whistleblower Law broadly prohibits an employer from discharging, disciplining, threatening, discriminating against, or penalizing an employee, or taking other retaliatory action impacting an employee's compensation, terms, conditions, location, or privileges of employment because of the employee's protected conduct.

The definition of protected activity under the Whistleblower Law is also exceedingly broad. It includes: 1) reporting in good faith a violation of any federal or state law or regulation to a supervisor or to any governmental body or law enforcement official; 2) being requested by a governmental body or law enforcement official to participate in an investigation, hearing, or inquiry; 3) refusing to engage in a criminal act that would subject the employee to criminal liability; 4) refusing an employer's order to perform an action that violates any federal or state law or regulation when the employee informs the employer that the order is being refused for that reason; or 5) providing information to or testifying before any governmental body or law enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation.

There is also no requirement to exhaust administrative remedies, thereby allowing employees alleging retaliation to immediately bring suit in court within one year of an alleged violation. A prevailing whistleblower can also obtain: 1) an injunction restraining further violations; 2) reinstatement to the same or an equivalent position; and/or 3) compensation for lost wages, benefits, and other remuneration, together with interest, and reasonable attorneys' fees and costs.

Like other federal and state whistleblower statutes, the Whistleblower Law's policy goal is to encourage legitimate whistleblowing and protect employees who have complained about alleged violations of law. The difference between this new law and many of the whistleblower laws that Virginia employers are already aware of, however, is the broad scope of protected activity.

Most federal whistleblower statutes limit protected activity to complaints about particular alleged unlawful conduct relevant to those statutes' policy aims. For example, under the False Claims Act, protected activity is tied to complaints about alleged government fraud.

This Whistleblower Law, however, appears to have no such tether. Any employee who complains about any perceived violation of any federal or state law to any supervisor, government body, or law enforcement official would be protected and have a potentially viable claim should they face nearly any form of reprisal.

Virginia's New Wage Theft Law

HB 123 and SB 838 (collectively, the "Wage Theft Law") creates a private right of action for employees to sue their employers for allegedly unpaid wages. Like the Whistleblower Law, this is a first of its kind in Virginia.

Previously, a Virginia employee had no private right of action in Virginia courts, but instead had to file an administrative claim with the Virginia Department of Labor & Industry. The Wage Theft Law permits recovery of wages owed (plus 8% interest from the date that the wages were due, which is higher than Virginia's 6% statutory pre-judgment interest for most other judgments). Most drastically, the law also permits recovery of *treble damages* and a $1,000 civil penalty per violation. If an employer is found to have committed a ""knowing violation," a court can also award attorneys' fees.

The law also carries potential *criminal* penalties for knowing violations. If the amount owed is under $10,000, employers can be found guilty of a misdemeanor. If the amount is over $10,000, or if an employer has similar previous offenses, employers can be found guilty of a felony subject to a corresponding prison sentence. The definition of "knowing" includes actual knowledge, deliberate ignorance, or acts in reckless disregard of the truth. Establishing that an employer acting knowingly does not require proof of specific intent to defraud the employee.

The Wage Theft Law also has an anti-retaliation provision that: "[a]n employer shall not discharge or in any other manner discriminate against an employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under [the Wage Theft Law], or has testified or is about to testify in any such proceeding." The anti-retaliation provision does not appear to have a private right of action, but it does permit the Commissioner of Labor & Industry to institute proceedings for "appropriate remedies for such action, including reinstatement of the employee and recovering lost wages and an additional amount equal to the lost wages as liquidated damages."

In addition, in the construction arena, the Wage Theft Law also imposes joint and several liability on general contractors for the nonpayment of wages by their subcontractors in certain circumstances. While requiring subcontractors to indemnify general contractors for this liability, those requirements are waived if the subcontractor's nonpayment of wages is a result of the general contractor's failure to pay the subcontractor *or* if the general contractor knew that the subcontractor was not paying wages.

As we have seen in Maryland and the District of Columbia, the availability of treble damages and attorneys' fees will likely make Virginia a magnet for new "wage theft" claims. Plaintiff's wage & hour lawyers will, like the Values Act, no doubt now forego federal unpaid wage claims in favor of filing suit in state court.

Virginia's New Employee Misclassification Law

The Governor signed a series of bills addressing the misclassification of employees as independent

contractors. HB 1407ER deputizes the Virginia Department of Taxation to investigate claims of misclassification, applying IRS guidelines. Violators are subject to civil penalties and debarment from public contracts. The civil penalties are up to $1,000 *per misclassified individual* for the first offense, $2,5000 per individual for the second offense, and up to $5,000 per offense for subsequent offenses. If the Department of Taxation determines that an employer misclassified an individual, all public bodies would be barred from awarding a contract to that employer for up to a year from a second offense and up to two years from a second offense.

HB 984ER also creates a private right of action for an employee to challenge his misclassification for the first time. Now, by statute, individuals are presumed to be employees, unless the employer can overcome the presumption and show that they are independent contractors. A successful claimant may be awarded wages, salary, fringe benefits, and attorneys' fees.

HB 1199 adds a retaliation claim for individuals who report their belief they are misclassified.

Finally, HB 1646 provides the Board of Contractors the ability to sanction contractors who are found to have knowingly and intentionally misclassified workers as independent contractors.

Virginia employers now have a significant incentive to revisit job descriptions, pay and staffing schemes, and classifications of those who work on their behalf. With the availability of attorneys' fees, coupled with the *presumption* of employee rather than an independent contractor status, misclassification suits have the potential to be a hotbed in Virginia.

Virginia's Ban on Restrictive Covenants for "Low-Wage" Employees

HB 330/SB 480 (the "Restrictive Covenant Law") prohibits employers from entering into, enforcing or threatening to enforce a restrictive covenant against "low-wage" employees. The Restrictive Covenant Law defines "low-wage" employees as those whose average weekly earnings are less than the average weekly wage of the Commonwealth, but does exclude "any employee whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses paid to the employee by the employer."

The Restrictive Covenant Law defines restrictive covenants as "an agreement that restrains, prohibits, or otherwise restricts an individual's ability to compete with his former employer." It creates a private right of action for employees seeking to challenge or enjoin their non-compete. If the employee is successful in such a challenge, the employer is liable for liquidated damages, lost compensation and attorneys' fees.

The law further requires an employer to post a notice in the workplace in the form of a summary of HB 330 approved by the Department of Labor & Industry informing employees of this restriction. HB 330 also imposes a civil penalty of up to $10,000 for each violation.

On restrictive covenants, Virginia jurisprudence has long disfavored restraint on competition while permitting restraint on *unfair* competition. HB 330 places a blanket prohibition on any restrictive covenant for half of the workers in Virginia. Employers will now need to be more selective in determining which employees they restrict. In some cases, employers may have to choose between

raising an employee's salary or placing absolutely no restriction on an employee's post-employment competition.

Minimum Wage

Notably, given the "low wage" definition of the Restrictive Covenant law, Governor Northam made only minor amendments to HB 395 and SB 7, to incrementally raise the minimum wage beginning May 1, 2021 and ultimately to $15.00 in 2026.

Marijuana Decriminalization and Sealing of Records

While Virginia continues to study the possibility of state-level marijuana legalization, Governor Northam also approved SB 2 and HB 972 which decriminalize simple marijuana possession offenses.

While the law reduces penalties for simple possession offenses (up to one ounce of marijuana) to a civil violation, notably, the law also seals the records related to prior convictions under this law and prohibits employers (and educational institutions) from requiring an applicant to disclose information concerning any now-decriminalized marijuana arrests, criminal charges, or convictions.

Implications for Employers

This is a brave new legal environment for Virginia employers. While the Values Act making Virginia the first state in the South to enact non-discrimination protections for LGBTQ people may have grabbed the lion's share of media attention, the totality of the new laws likely means that Virginia state courts are now–for the first time–an attractive place for employees to sue Virginia employers.

This attractiveness may well prove irresistible to potential claimants when combined with the concept unique to Virginia state courts where–by law and rule–litigants generally cannot use either deposition transcripts or affidavits to support a motion for summary judgment. This makes summary judgment in employment cases–which often involve conflicting testimony and emails open to varying interpretation–in Virginia state nearly impossible to obtain.

Is Virginia to become the new California? Time will tell, but, as one of our California colleagues noted, "At least we can win summary judgment every so often..."